IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

COMET RICE, INC.,
PLAINTIFF

V. NO. 4:92CV278-B-D

JAMES ROBERTSHAW, PHILIP B. TERNEY,
E. RANDOLPH NOBLE, JR. AND
ROBERTSHAW, TERNEY & NOBLE,
A MISSISSIPPI GENERAL PARTNERSHIP,
DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the plaintiff's motion for partial summary judgment on its claims of breach of escrow agreement and conversion and the defendants' motion for summary judgment or for partial summary judgment on the issues of punitive damages and attorney's fees. The court has duly considered the parties' memoranda and exhibits and is ready to rule. The plaintiff moves to strike the defendants' motion for failure to submit an itemization of undisputed facts. Since the defendants' memorandum incorporates an extensive statement of facts and citations to supporting exhibits, the court finds that the motion to strike is not well taken and should be denied.

I. INTRODUCTION

The plaintiff, a former client of the defendants, brought this action to recover funds placed in escrow pursuant to a settlement

agreement with its creditors, The Prudential Insurance Company of America [Prudential] and Internationale Nederlanden Bank, N.V. [INB], and to recover damages for alleged breach of escrow agreement, breach of settlement agreement, conversion, breach of fiduciary duty, legal malpractice, disloyalty, and alleged excessive fees. The defendants counterclaimed for reasonable attorney's fees for services rendered in the plaintiff's dispute with Prudential and INB and in two other matters.

II. FACTS

The plaintiff is a foreign corporation engaged in the business of purchasing, milling and processing rice and formerly owned a rice milling and processing facility in Greenville, Mississippi. Prudential held a first mortgage on the rice mill and INB held a perfected security interest in the plaintiff's machinery and equipment at the mill. On August 19, 1992, the plaintiff, Prudential and INB executed a settlement agreement whereby the plaintiff would sell certain equipment and machinery at the Greenville facility to Prudential for the sum of $1,500,000.00. The parties agreed that the funds represented the proceeds of the collateral in which INB held a security interest. The Amendment To Settlement Agreement, ¶ IV, provides that the amount to be paid by Prudential

> is to be paid as further outlined below into a separate interest bearing trust account of Robertshaw, Terney & Noble by wire transfer, and to be held on behalf of INB in order to

> continue the priority of the perfected security interest of INB in the proceeds of the sale of Comet's interest as outlined herein. The funds will thereafter be distributed upon the written agreement of Comet and INB, and in accordance with the following:
>
> (1) Seven hundred fifty thousand dollars ($750,000.00) may be withdrawn immediately as agreed between INB and Comet.
>
> (2) An additional fifty thousand dollars ($50,000.00) (the "escrow funds"), an amount calculated sufficient to satisfy Notices of Tax Liens...will be held until said tax liens are satisfied or otherwise cancelled of record....
>
> (3) The remaining seven hundred thousand dollars ($700,000.00) to remain in said trust account until the sale of the Facility or until the expiration of thirty (30) days, whichever is sooner, and then disbursed upon the agreement of Comet and INB.

INB's counsel wrote Robertshaw a letter dated August 19, 1992 which reads:

> In order to preserve the priority of the perfected security interest of INB in the proceeds to be received from Prudential upon the sale of Comet's interest in the equipment at the Facility, Comet and INB have agreed that the payment of any proceeds from the Settlement Agreement between Comet Rice, Inc., The Prudential Insurance Company of America, and INB will be paid into your trust account, and that you will hold such monies on behalf of INB, and will not disburse any of the proceeds in said escrow account until such time as Comet Rice, Inc. and INB have agreed to the distribution of the same.
>
> If your understanding of the agreement coincides with that outlined above, please execute a copy of this letter and fax it to me at your earliest convenience.

Robertshaw signed and returned the letter to INB's counsel. The funds were deposited into a separate account opened by Robertshaw at Deposit Guaranty National Bank in Greenville, Mississippi. Robertshaw testified in his deposition that he understood the above-quoted letter to create an escrow agreement whereby he would hold, as escrow agent, the settlement proceeds for Comet and INB and that he could not "withdraw any money without authorization from both of them."

On July 9, 1992 Robertshaw sent the plaintiff an interim statement for fees calculated on an hourly rate and expenses. The plaintiff neither paid nor acknowledged this statement. On August 25, following the settlement, Robertshaw sent the plaintiff a final statement based on an hourly rate, including the July 9 bill, and a results fee of $150,000.00. His cover letter complains that the July 9 time and expense charges had not been paid and he had devoted almost his entire time representing the plaintiff since June 1, 1992. Having received no response, he sent a follow-up letter to the plaintiff on September 8, 1992 which reads in part:

> Not having heard from Comet since our initial bill of about $12m on July 9th, or since re-billing our services two weeks ago, we are assuming the amount suggested is acceptable. Since the escrow funds were generated by our services, we would have a common law lien to secure this payment.

Robertshaw rejected the plaintiff's offer of payment of $15,000.00 "on account." By a September 11, 1992 letter signed by the

plaintiff's vice president and INB's representative, Robertshaw was authorized "to release and disburse all funds remaining to close out the escrow account" to INB's agent. On September 14, Robertshaw faxed a letter to the plaintiff and INB advising that he had transferred the escrowed funds as directed, except the funds to which his law firm asserted a possessory attorney's lien. The letter stated that the balance would be held in the escrow account "until 12:00 noon, September 30, 1992, to afford Comet and\or INB a reasonable opportunity to commence an appropriate action to contest our claim of a lien on these funds." On September 17 the plaintiff sent Robertshaw a handwritten fax which reads:

> I now have your original invoices in hand and have authorization to make partial payment to you of $43,816.07. This will not represent payment in full as we recognize the results fee charged of $150,000 is still open to negotiation and payment. However, this message represents our authorization for you to withdraw $43,816.07 from the escrow [account] which you hold for us to apply as the partial payment described above. Please advise if this is a problem. Will obtain [INB'S] authorization tomorrow.

However, on September 22, 1992 the plaintiff sent Robertshaw a wire transfer of $43,816.07 for payment in full of the defendants' hourly fees and expenses.

Robertshaw testified in his deposition that at the outset he told Gerald Murphy, the chief executive officer and 100% owner of Comet Rice, Inc., with authority to retain and make a fee arrangement with the defendants, that he would charge the plaintiff

an additional "results fee or a fee based on results." Murphy testified in his deposition that he understood his discussion with Robertshaw to involve a potential bonus within the plaintiff's discretion. Murphy indicated a willingness to recommend a bonus of $25,000 to $50,000 but no negotiation ensued. Robertshaw testified in his deposition that he did not consider the proposed "bonus" "a bona fide offer or bona fide negotiation." On October 5, Robertshaw, with the approval and consent of defendants Terney and Noble, removed the sum of $150,000.00 from the escrow account and deposited the money into the defendant firm's general account. The proceeds were divided between defendants Robertshaw, Terney and Noble on the basis of 35%, 32.5% and 32.5%, respectively. Robertshaw refused to return the funds to the escrow account upon demand of INB and the plaintiff. Terney and Noble condoned his actions.

III. LAW

A. Standing

The defendants move for summary judgment on the plaintiff's claims on the ground that it no longer has standing. This action was brought on November 27, 1992. On May 26, 1993 the plaintiff conveyed all of its assets to American Rice, Inc., including any claims asserted in the instant action. American Rice, Inc. has filed a ratification of action stating that although American Rice, Inc. was ostensibly the survivor of the corporate merger, the

United States Security and Exchange Commission has ruled that the merger was a reverse transaction and that the plaintiff actually acquired American Rice, Inc. In any event, the ratification provides:

> Pursuant to the provisions of Fed. R. Civ. Proc. 17(a), American Rice now affirmatively states that it hereby joins in, ratifies, approves, adopts and agrees to be bound by all rulings and judgments rendered herein.

The court finds that American Rice, Inc.'s ratification cures any deficiency with respect to the plaintiff's standing as the real party in interest.

The plaintiff moved for partial summary judgment on the breach of escrow agreement and conversion claims and the defendants cross-moved for summary judgment or for partial summary judgment. The plaintiff concedes that the defendants were not parties to the settlement agreement between Prudential, INB and the plaintiff and therefore withdraws any claim for breach of settlement agreement. With respect to the escrow agreement, the defendants argue that the plaintiff was neither a party to the escrow letter written by INB's counsel nor a third party beneficiary and thus has no standing to enforce the letter.

The fact that the escrow letter was written by only INB's counsel is not decisive as to the plaintiff's rights under the escrow agreement embodied in the settlement agreement and the escrow letter. The defendants contend that the plaintiff was not

an intended beneficiary of the escrow letter on the ground that the letter stated that the settlement proceeds would be held in escrow "on behalf of INB" and that the balance after payment of certain expenses was to be disbursed to INB, according to Murphy's deposition testimony. The defendants assert that the express purpose of holding the settlement funds in escrow was to protect INB's perfected security interest in the proceeds as against the plaintiff. However, Robertshaw agreed in his deposition testimony that under the terms of the escrow agreement arising out of the escrow letter, he would hold the funds as escrow agent for the plaintiff and INB and that he understood that the escrow funds could be disbursed only upon instructions from both the plaintiff and INB, as stated in the letter.

The cases cited by the defendants involve contracts clearly executed for the benefit of the contracting parties. Mississippi High School Activities Ass'n, Inc. v. Farris, 501 So.2d 393 (Miss. 1987); Burns v. Washington Sav., 171 So.2d 322 (Miss. 1965). In Burns the court held that a building contractor had no standing to maintain a breach of contract action against a lender who refused to extend loans for the construction of certain individuals' residences. Id. at 326. The court stated

> [t]he right of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself.
>
> . . . .

> We find no expression or words in the alleged contract expressly including appellant, either by name or as one of the specified class.

Id. at 325 (emphasis in original). The court in Farris held that students were mere incidental beneficiaries to a contract between a high school and an association that regulates interscholastic activities of member schools. 501 So.2d at 396.

By definition, an escrow is a "contractual undertaking to assure the carrying out of obligations already contracted for." 30 C.J.S. Escrows § 2. In a case construing Florida law,[1] the court explained that an escrow agent

> is, in effect, a stake-holder who agrees, expressly or impliedly, to hold possession of some property (usually funds) and to act with regard thereto (usually meaning to disburse the funds) in accordance with some agreement between the principal parties who have agreed to the escrow agreement.... In every such escrow agreement there are two agreements involved, although both can be incorporated into one document. The primary agreement is that between the principal parties who have or claim an interest in the escrowed funds. The second agreement is the agency agreement between the main parties as principals and the escrow agent.

United American Bank of Central Florida, Inc. v. Seligman, 599 So.2d 1014, 1016 (Fla. Dist. Ct. App. 5th Dist. 1992). The escrow

[1]The plaintiff and defendants cite Seligman in support of different propositions. In the distribution phase of an eminent domain proceeding, the Fifth Circuit relied on both Mississippi and Florida law in determining the priority of an attorney's charging lien. United States v. 717.42 Acres of Land, 955 F.2d 376, 382 (5th Cir. 1992).

agreement underlying the escrow letter from INB to Robertshaw is incorporated in the settlement agreement to which both INB and the plaintiff, as well as Prudential, were parties. The Amendment to the Settlement Agreement and the escrow letter expressly refer to the proceeds of the sale of Comet's interest. The funds could not have been deposited into the escrow account in the first instance absent the plaintiff's consent and any disbursement of the funds was expressly conditioned on the mutual consent of INB and the plaintiff.

Robertshaw stated in his deposition and in a phone conversation he recorded that he could not release the funds without instructions from both the plaintiff and INB. The plaintiff asserts that the defendants' removal of funds from the escrow account required repayment of its loan obligation to INB with other funds. Since the funds were placed in escrow for the specific purpose of satisfying the plaintiff's loan obligation to INB, the court finds that the plaintiff was not only a principal party to the escrow agreement embodied in the settlement agreement but also an intended beneficiary of the escrow letter.

B. Liens

Robertshaw asserted a lien before transferring $150,000.00 to the defendants' general account in payment of attorney's fees. In support of their motion, the defendants assert both a retaining or possessory lien and a charging lien. Mississippi recognizes

attorneys' retaining and charging liens. Webster v. Sweat, 65 F.2d 109, 110 (5th Cir. 1933). Under Mississippi law

> an attorney has a lien on all writings, documents and money of his client which come into his possession in the course of his professional employment. This lien entitles the attorney to retain possession of those papers, writings or money until all his fees are paid. Webster v. Sweat, 65 F.2d 109 (5th Cir. 1933). Mississippi also recognizes a "special" or "charging" lien which entitles an attorney who, by his services, recovers a judgment, to have his fee satisfied out of that judgment.

Brothers in Christ, Inc v. American Fidelity Fire Ins. Co., 680 F.Supp. 815, 818 (S.D. Miss. 1987). The plaintiff contends that in the absence of a judgment the defendants do not arguably have a charging lien. In other jurisdictions, charging liens attach to not only judgments but also settlement proceeds. 7 Am. Jur. 2d, Attorneys at Law § 343 at 349-50. In Florida, a charging lien "arises when counsel obtains property or collects money in litigation and claims a lien for services in creating the fund." E.g., Adams, George, Lee, Schulte, & Ward, P.A. v. Westinghouse Electric Corp., 597 F.2d 570, 573 (5th Cir. 1979) (construing Florida law).

Even if the court were to determine that the Mississippi Supreme Court would extend the charging lien to settlement proceeds, the settlement in the instant cause did not involve payment of an agreed upon sum to only the defendants' then client. In Mississippi, "[i]n order for a valid charging lien to exist, the

attorney must have procured a judgment or decree in favor of his client." Brothers in Christ, Inc., 680 F.Supp. at 818. (emphasis added). In Brothers in Christ, Inc., a check was made payable not only to the plaintiffs, a general contractor [Brothers] and the law firm it retained [Reynolds], but also to the third-party plaintiff insurance company [AFFI] that issued payment and performance surety bonds. The court stated:

> One problem evident under the facts presented is the absence of any judgment or decree in favor of Brothers. In fact, no lawsuit was even filed. Consequently, there can be no charging lien. Further, even were the check from the owner characterized as being in the nature of a judgment or decree, the check is not in favor of Brothers and/or Reynolds only, but rather is specifically made payable to AFFI as well. Hence, it can hardly be said to be equivalent to a judgment for Brothers.

Id. Similarly, the court finds that the escrow account was not the equivalent of a judgment or recovery of funds procured outright by the defendants on behalf of their former client. Accordingly, the court finds, as a matter of law, that the defendants did not have on charging lien to the funds in question.

An attorney's lien arises out of an "express contract between attorney and client for a stated fee, or...an implied contract to pay the reasonable value of services rendered." Halsell v. Turner, 36 So. 531 (Miss. 1904), cited in Collins v. Schneider, 192 So. 20, 22 (Miss. 1939). The court finds that there is a genuine issue of material fact as to the defendant's contractual right to

compensation in excess of the hourly fee previously paid by the plaintiff and, if so, the amount of additional compensation due the defendants.

The plaintiff asserts that, assuming arguendo that the defendants are entitled to additional compensation, no retaining lien attached to the escrowed funds. A general principle of law provides that "property delivered for a specific purpose is not subject to a retaining lien." The Florida Bar v. Bratton, 413 So.2d 754, 755 (Fla. 1982) (client's funds entrusted to attorney for the specific purpose of posting a bond "should have been returned to the client regardless of any outstanding attorney's fees") (citing 7 Am Jur. 2d Attorneys at Law § 318 at 333). See e.g., King v. Tyler, 250 S.E.2d 784 (Ga. Ct. App. 1978) ("money delivered to the attorney by the client for a special purpose cannot be made the subject-matter of a retaining lien in favor of the attorney"). The parties cite no Mississippi case addressing the validity of an attorney's lien on escrowed funds.

The defendants distinguish the numerous cases in other state jurisdictions on the ground that the funds in question were not produced by efforts of the attorney asserting the lien. However, a general or retaining lien by definition "is not limited to the [money generated] in any particular suit, but extends to the general balance due to the attorney for any and all professional services performed by him for his client." Webster, 65 F.2d at

109. In other words, it may attach to property that is in the attorney's possession but not related to his services. In a case cited by the defendants, the court stated:

> Unlike a charging lien, a retaining lien covers the balance due for all legal work done on behalf of the client regardless of whether the property is related to the matter for which the money is owed to the attorney.

Daniel Mones, P.A. v. Smith, 486 So.2d 559, 561 (Fla. 1986) (emphasis added). The court in Daniel Mones, P.A. held that the attorney was entitled to a retaining lien on funds placed in his trust account for the full balance of all fees due for services rendered in the pending action and in prior matters. Id. at 562. The court reasoned:

> The district court interpreted our decision in The Florida Bar v. Bratton, 413 So.2d 754 (Fla. 1982), as authority for the proposition that attorney's trust accounts are not subject to setoffs for past legal services rendered in unrelated cases. Such an interpretation of Bratton is unwarranted. In Bratton we ruled that an attorney cannot impose a valid retaining lien on client's funds entrusted to the attorney for a specific purpose where the parties have not agreed that fees should be paid out of the entrusted funds. In the case at bar the funds were not held for a specific purpose and, accordingly, Bratton is inapplicable.

Id. at 561-62. The defendants cite Daniel Mones, P.A. and Adams, George, Lee, Schulte, & Ward, P.A. in support of their argument that trust or escrow accounts do not defeat an attorney's lien. Both cases involved deposit of settlement funds into the attorney's

general trust accounts pursuant to disbursement between the attorney and his client.

The court finds that the reason underlying an attorney's possession of his client's property is a controlling factor:

> The effect of the purpose of the delivery of the property to the attorney has generally been of great importance in determining whether the property is subject to the attorney's retaining lien. Thus, courts have ruled that an attorney did not acquire a retaining lien in the client's funds deposited with the attorney for the purpose of making specific payments [or] property received in escrow or trust in connection with the sale of the clients' assets....Courts have also held that an attorney could not acquire a retaining lien in a settlement payment delivered to the attorney in trust or escrow.

70 A.L.R. 4th § 2[a] at 827, 833 (1989). As a general rule, "an attorney possessing property solely as an escrow agent is not entitled to a retaining lien on such property." 7A C.J.S. Attorney and Client § 377. It is undisputed that the settlement proceeds in the instant cause were deposited into a separate escrow account at Deposit Guaranty National Bank pursuant to a disbursement scheme prescribed in the Amendment to Settlement Agreement. The funds were to be held in escrow for the express and specific purpose of preserving INB's security interest. Neither the escrow letter nor the settlement agreement mentions payment of attorney's fees. The court finds that since Robertshaw accepted the settlement funds as

an escrow agent, neither he nor his law firm [2] acquired a retaining lien on those funds.

C. Breach of Escrow Agreement

Since no lien attached to the escrowed funds, the issue of enforcement of a charging or retaining lien is moot. The court must next address the defendants' alleged breach of escrow agreement and conversion. Contrary to Robertshaw's deposition testimony, the defendants argue that the escrow letter and Robertshaw's signature thereon signified only his understanding of the terms of INB's and the plaintiff's escrow agreement and did not impose any independent obligations on them. Robertshaw understood the letter to create an agency agreement whereby he would act as the escrow agent. The duties of an escrow agent are as follows:

> The duties of a depositary or escrow holder are those set out in the escrow agreement. His authority is to be strictly construed, and not extended beyond that which is given in terms or is necessary and proper to carry the authority given into full effect. As a general rule, the escrow holder must act strictly in accordance with the provisions of the escrow agreement. He must comply strictly with the instructions of the parties....

30 C.J.S. Escrows § 10. See Seligman, 599 So.2d at 1016 ("An escrow agent is, in effect, a stake-holder who agrees, expressly or impliedly, to hold possession of some property (usually funds) and to act with regard thereto (usually meaning to disburse the

[2] Robertshaw acted on behalf of and with the consent of the other defendants.

funds)"). The terms of the escrow agreement, as stated in both the Amendment to Settlement Agreement and the escrow letter, are unambiguous. The court finds that the transfer of a portion of the escrowed funds to the defendants' general account, contrary to instructions to disburse all of the remaining funds to INB's agent, constituted a breach of the escrow agreement.

D. Conversion

Separate from the contract claim, the plaintiff alleges a tort claim of conversion. The defendants contend that the plaintiff's remedy, if any, is limited to recovery for breach of contract. The court in Seligman held:

> The essence [of the tort cause of action of conversion] does not appear to fit the facts of this case where the escrow agent rightfully came into possession of the funds, and the escrow agent's failure to deliver the escrowed funds to the proper person was the breach of a contractual duty, rather than the breach of a duty imposed by tort law.

599 So.2d at 1017. The escrow agent in Seligman disbursed escrowed funds to his client instead of the assignee of his client's interest in the escrowed funds. Id. Seligman and other cases cited by the defendants involve the escrow agent's mere failure to perform under the terms of the escrow agreement whereas in the instant cause funds were transferred from the escrow account to the defendant law firm's general account and disbursed to its individual partners. The defendants argue that mere allegations cannot convert a complaint that clearly sounds in contract into a

tort action. Smith v. Orkin Exterminating Co., 791 F. Supp. 1137 (S.D. Miss. 1990), aff'd, 943 F.2d 1314 (5th Cir. 1991); Chipman v. Lollar, 304 F. Supp. 440, 444-45 (N.D. Miss. 1969). Unlike a bad faith claim, the conversion claim is not predicated on the defendants' breach of contract. See Adams, George, Lee, Schulte, & Ward, P.A., 597 F.2d at 573 (absent a lien, an attorney's withholding of funds for payment of fees "would be a conversion by the lawyer of property belonging to his client").

The Mississippi Supreme Court has held:

> To make out a conversion, there must be proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand.

PACCAR Financial Corp. v. Howard, 615 So.2d 583, 588 (Miss. 1993) (quoting Mississippi Motor Finance, Inc. v. Thomas, 149 So.2d 20, 23 (Miss. 1963)) (emphasis added). The defendants assert that the plaintiff's conversion claim fails as a matter of law on the ground that the plaintiff had no right of immediate possession to the funds as against INB. The court rejects the defendants' attempt to engraft the requirement of a right to immediate possession on the elements of conversion:

> In order to succeed on a claim for conversion, a plaintiff must show that he owned or had a right to possess property which was the subject of an unauthorized taking or the unauthorized exercise of control by the defendant.

Lyons v. Misskelly, 759 F.Supp. 324, 327 (S.D. Miss. 1990) (citing LaBarre v. Gold, 520 So.2d 1327, 1330 (Miss. 1987) and Masonite Corp. v. Williamson, 404 So.2d 565, 567 (Miss. 1981)) (emphasis added).

The plaintiff must either have an ownership interest or a right to possess the escrowed funds in order to maintain a cause of action for conversion. Under the terms of the escrow agreement, the plaintiff clearly had no right to possess the funds while held in the escrow account. However, the plaintiff was the fee owner of the machinery and equipment and upon the conveyance to Prudential, its title transferred to the sale proceeds subject to INB's security interest. The Amendment to Settlement Agreement expressly provides that INB will hold a first priority lien in the sale proceeds; it is the plaintiff and not INB who owned the sale proceeds. Under the Amendment to Settlement Agreement, the balance of the funds in escrow were to be "disbursed upon the agreement of Comet and INB." The requirement of the plaintiff's consent is consistent with its ownership interest. Furthermore, it is inconsistent for the defendants to assert a retaining lien on the escrowed funds and yet argue that the plaintiff had no title to or interest in the funds.[3]

The defendants, as escrow agent, lawfully assumed dominion

[3] The defendants focus on the requirement of a possessory right and do not address the issue of the plaintiff's ownership interest.

over the funds when they were deposited into the escrow account. However, absent an attorney's lien, the defendants' authority to hold the funds terminated upon disbursement instructions from the plaintiff and INB. Cf. Lyons, 759 F. Supp. at 327 transfer of funds by check). The court in Lyons held:

> John Hancock's taking and exercising control over the money was authorized by lyons when he provided John Hancock with the check. Moreover, by virtue of the check, plaintiff's rights to the money were terminated and John Hancock became the legal owner of the $20,000.

Id. The Mississippi Supreme Court has held that actions subsequent to lawfully obtaining possession may constitute conversion. PACCAR, 615 So.2d at 589. In PACCAR the defendant finance company lawfully repossessed a vehicle containing the plaintiff's personal property but removed the vehicle to "a foreign jurisdiction, far removed from the destination [the plaintiff] was led to believe [the vehicle and personal property] would be taken." Id. at 589. The court stated:

> While PACCAR was not in wrongful possession of Howard's personal property at the time of repossession, we must assess its subsequent actions in the light most favorable to the jury verdict.... Under these circumstances, it was not unlikely or unreasonable that a jury might find PACCAR's actions constituted an unlawful detention of the chattels without regard to the fact that original possession was lawfully obtained.

Id. The court finds that Robertshaw's removal of the sum of $150,000.00 from the escrow account for the defendants' use

constitutes "wrongful detention after demand" or "a withholding of the possession under a claim of right or title inconsistent with that of plaintiff." PACCAR, 615 So.2d at 588. Without an attorney's lien, the defendants are liable for conversion, independent of their entitlement, if any, to additional compensation for legal services rendered.

PUNITIVE DAMAGES AND ATTORNEY'S FEES

The defendants move, in the alternative, for partial summary judgment as to the plaintiff's claims for punitive damages and attorney's fees on the ground that in good faith they asserted and enforced an attorney's lien on funds within their possession. Punitive damages are reserved for extreme cases and should be considered '"only with caution and within narrow limits."' Snow Lake Shores Property Owners Corp. v. Smith, 610 So.2d 357, 362 (Miss. 1992) (quoting Consolidated American Life Ins. Co. v. Toche, 410 So.2d 1303, 1304-05 (Miss. 1982)). With respect to the breach of escrow agreement claim, punitive damages may be awarded in breach of contract cases only "where the breach results from an intentional wrong, insult, or abuse as well as from such gross negligence as constitutes an independent tort." Blue Cross & Blue Shield of Mississippi, Inc. v. Maas, 516 So.2d 495, 496 (Miss. 1987), quoted in Snow Lake Shores Property Owners Corp., 610 So. 2d at 362. With respect to the conversion claim, the 1993 Tort Reform Act provides in part:

> Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

Miss. Code Ann. § 11-1-65(1)(a) (Cum. Supp. 1994). See Strickland v. Rossini, 589 So.2d 1268, 1273 (Miss. 1991) ("a plaintiff is entitled to punitive damages only if he has demonstrated a willful or malicious wrong or the gross, reckless disregard for the rights of others").

The court finds that, in light of the plaintiff's delay in paying even the hourly fee, the defendants' assertion of a lien was not so egregious as to justify punitive damages. The court further finds that the defendants reasonably assumed that they either expressly or impliedly were entitled to compensation in excess of their hourly fee. Prior to the plaintiff's and INB's disbursement instructions and again prior to his removal of the sum of $150,000.00, Robertshaw asserted an attorney's lien and gave the plaintiff and INB an opportunity "to commence an appropriate action to contest" their claim of a lien.

The plaintiff asserts that Robertshaw acknowledged in his deposition testimony that as long as the funds remained in escrow, he had adequate protection for any claimed attorney's fees. However, Robertshaw did not remove the disputed $150,000.00 until after the plaintiff and INB instructed disbursement of the

remaining funds to INB's agent; the letter of instruction made no mention of attorney's fees. Robertshaw's withholding and removing the disputed sum was consistent with his legal conclusion that the lien was paramount to the interests of both the plaintiff and INB. United States v. 717.42 Acres of Land, 955 F.2d 376, 382 (5th Cir. 1992) ("Mississippi law...give[s] an attorney's charging lien first priority for payment from the fund created through the efforts of the attorney") (citing Chattanooga Sewer Pipe Works v. Dumler, 120 So. 450 (Miss. 1929)); Halsell v. Turner, 36 So. at 531. 1904). When asked if he was aware, prior to October 5, 1992, of any Mississippi authority for unilateral enforcement of a lien, Robertshaw testified in his deposition: "[T]he law is quite clear that an attorney does have a charging lien on the product of his services. The [Mississippi] cases are silent as to how [a charging lien on property in the attorney's possession] should be enforced, so far as I know."[4] Robertshaw's agreement in his deposition testimony that a judicial resolution would take "a long time" does

[4]In Mississippi "there is no statute fixing or regulating the lien of an attorney, or the enforcement thereof." Collins v. Schneider, 192 So. at 22. The plaintiff cites Stewart v. Flowers, 44 Miss. 513, 529 (Miss. 1871) (overview of early common law development of attorney's liens in other states and Great Britain) in support of the general principle that a charging lien must be enforced pursuant to a court order. Since the court in Stewart held that the plaintiff attorney did not have a lien on certain funds of his former client, it was reasonable for Robertshaw to disregard Stewart as authority on the issue of enforcement of a lien on property already in the attorney's possession. Id. at 532.

not negate his understanding that he had a right to remove the funds generated by his efforts to secure payment of attorney's fees.[5]

The defendants contend that, at worst, their actions constitute no more than a mistake of law. Robertshaw testified in his deposition that he directed legal research on the scope and effect of attorney's liens in Mississippi before reaching the conclusion, albeit erroneous, that he held a paramount attorney's lien on the funds created by his efforts.[6] The fact that the defendants reached an incorrect legal conclusion does not establish malice, gross negligence or reckless disregard of others' rights. The court finds no basis for either punitive damages or attorney's fees.

CONCLUSION

For the foregoing reasons, the court finds that there are no genuine issues of material fact regarding the claims of breach of escrow agreement and conversion and that the plaintiff is entitled

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[5]The plaintiff concedes that it is aware of no Mississippi decision directly addressing the extent to which an attorney may claim a lien on funds held in escrow.

[6] The plaintiff objects to the defendants' claim that Robertshaw's actions were based on legal research since it was precluded from discovering the substance of his research under the work product privilege. The court duly considered and rejected this argument in resolving a discovery dispute. In any event, it is not disputed that Robertshaw relied on research of Mississippi law on attorney's liens and enforcement thereof. As quoted in the text, supra, Robertshaw explained in his deposition the results of the research conducted at his request.

to partial summary judgment, as a matter of law. The court further finds that there are no genuine issues of material fact as to the plaintiff's claims for punitive damages and attorney's fees and that the defendants' motion for partial summary judgment should be granted. The defendants' motion for summary judgment should be granted as to the breach of settlement agreement claim and denied as to the remaining claims. An order will issue accordingly.

THIS, the _____ day of January, 1995.

_____
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE